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FEDERAL • PROVINCIAL • TERRITORIAL
CONSULTATION

Custody, Access and Child Support in Canada

MARCH 2001

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INTRODUCTION

Children are very important to Canada's future. For this reason, the federal, provincial and territorial governments want to help parents, lawyers and judges focus on what is best for children when making decisions about separation and divorce.

Even though most separating and divorcing couples end their relationships and arrange for the care of their children without going to court, family breakdown can be difficult for children.

This document talks about two topics related to separation and divorce that affect children. The first is parenting after separation or divorce, and the second is child support. The text explains these topics and contains questions about ways governments can improve both the **laws** and the **services** they offer in these areas, so that what is best for children comes first when decisions are being made during separation or divorce.

Further Reading

Selected Statistics on Canadian Families and Family Law, Department of Justice Canada

Custody, Access and Child Support: Findings from the National Longitudinal Survey on Children and Youth, Nicole Marcil-Gratton and Céline Le Bourdais

* *Survey on Arrangements Dealing with Custody and Access*, Canadian Facts

See page 5 for information on how to get copies of these research papers.

* Forthcoming

Family Law in Canada

In Canada, federal, provincial and territorial governments have adopted laws that deal with various aspects of family law, including separation and divorce.

The federal and provincial governments have specific constitutional powers with respect to family law, and the territorial governments have specific responsibilities under their original acts. The federal *Divorce Act* generally applies when divorcing parents need to settle child custody, access and support. Provincial and territorial laws apply regarding child custody, access and support when unmarried parents separate or when married parents separate and do not pursue a divorce, as well as to some issues in divorce proceedings. These provincial and territorial laws contain provisions regarding parent-child relationships (parental authority, guardianship, etc.). The provinces also have constitutional power over the administration

of justice, and the territories have delegated powers. The provinces and territories are responsible for establishing the rules of civil procedure and administering court services within their jurisdiction.

Federal legislation and legislation in common law provinces and territories now use the same terms "custody" and "access," and the same general legal principles apply to govern custody and access issues. The situation is different in Quebec, however, given the rules set out in the *Civil Code of Quebec*. In Quebec, the *Civil Code*, following the civil law tradition, refers to the concept of parental authority to define parents' rights and obligations towards their children. The *Code* establishes the principle that the father and mother exercise parental authority together when there is a marriage breakdown, separation or divorce. It is in the interests of the federal, provincial and territorial governments to develop co-ordinated reforms to family law that will maintain legislative harmony and that will avoid creating confusion and uncertainty for parents and courts.

The decisions parents make are set out in a written separation agreement or a court order. Most of the time, parents can work out the arrangements by themselves or negotiate an agreement with the help of others, such as lawyers or a mediator. This agreement can then be turned into a written separation agreement or be incorporated into a court order. If parents cannot agree, they can go to court and have a judge decide their parenting arrangements.

The information people provide by answering the questions in this document will guide governments as they look at possible changes to federal, provincial or territorial laws. However, recognizing that changing the law cannot address all the problems facing separating and divorcing parents, this document also asks for views on services that would help parents and children.

Family Law Services

Most people are unfamiliar with legal processes or with the issues that need to be resolved when a couple separates or divorces. Going to court to settle disputes about separation and divorce, including issues about children, can be very stressful for parents and children. The legal process can be lengthy, expensive and confusing.

Across Canada, the provinces and territories offer a range of services for separating and divorcing parents to try to make the family law system easier to understand and use. The services are broad and flexible, in order to help people in a variety of circumstances, and parents can use them before, during and after the court process. The services cover a spectrum, from simple information about family law to specialized assistance to keep family members safe during separation or divorce. For a recent listing of family law services offered across the country, please see *An Inventory of Government-Based Services That Support the Making and Enforcement of Custody and Access Decisions*, at **http://www.canada.justice.gc.ca/en/ps/cca/invent/main.htm**

Many families going through separation and divorce use services to help them resolve their disputes early, quickly and with less conflict. Such services include the following:

- Information programs: programs that teach parents how to promote their children's best interests through co-operation and consultation, when it is safe and positive to do so. The aim of these programs is to help parents understand the demands and challenges of parenting after separation or divorce; to suggest new ways to communicate and resolve disputes; and to suggest appropriate alternatives to the formal court process.
- Mediation: an impartial, professionally trained mediator can help parents who have a relatively equal bargaining position reach a mutually satisfactory agreement on issues affecting the family. Parents who go through mediation still need the help and advice of a lawyer.
- Case management: this approach encourages early settlement of disputes, by having judges and others actively manage the court process to reduce unnecessary delay and expense. This approach also helps parents focus on the issues truly in dispute, while encouraging them to agree on others. This process can involve pre-trial or settlement conferences between the judge and the parents or their lawyers.

This consultation paper asks the public for input on existing family law services so that governments can get a better understanding of the kinds of services people find most helpful when separating or divorcing, and dealing with custody, access and child support issues. The information people provide by answering the questions in this document will provide governments with valuable information as to which services are most useful to families dealing with custody and access issues.

Interjurisdictional Collaboration

The Family Law Committee is a long-standing committee of government officials who are familiar with family law and represent each province and territory and the federal government. It has a federal co-chair and a provincial co-chair and reports to the federal, provincial and territorial deputy ministers responsible for Justice. Where necessary, its work is discussed and approved by deputy ministers and ministers responsible for Justice across Canada.

The Family Law Committee is reviewing legislation and services to find a way to help families work out the best arrangements for children after their parents separate or divorce. It has adopted an integrated, child-focused approach to its work. The Family Law Committee's child custody and access project co-ordinates research, analysis, and policy and program development among federal, provincial and territorial policy advisors and service providers. This project will also look at the recommendations of the Special Joint Committee on Child Custody and Access. (You can read the Committee's report *For the Sake of the Children* on the parliamentary web site at **http://www.parl.gc.ca/InfoComDoc/36/1/SJCA/Studies/Reports/sjcarp02-e.htm**). The project is to be completed by spring 2002.

Guiding Principles

Representatives of the federal, provincial and territorial governments developed the following principles to guide reforms in the areas of custody, access and child support:

- Ensure that the needs and well-being of children come first.
- Promote an approach that recognizes that no one way of parenting after separation and divorce will be ideal for all children, and that takes into account how children and youth face separation and divorce at different stages of development.
- Support measures that protect children from violence, conflict, abuse and economic hardship.
- Recognize that children and youth benefit from the opportunity to develop and maintain meaningful relationships with both parents, when it is safe and positive to do so.
- Recognize that children and youth benefit from the opportunity to develop and maintain meaningful relationships with their grandparents and other extended-family members, when it is safe and positive to do so.
- Recognize the positive contributions of culture and religion in children's lives.
- Promote non-adversarial dispute-resolution mechanisms and retain court hearings as mechanisms of last resort.
- Provide legislative clarity to the legal responsibilities of caring for children.
- Recognize the overlapping jurisdictions in custody and access matters in Canada, and make efforts to provide co-ordinated and complementary legislation and services.

Governments will assess the suggestions for change that come from these consultations to see whether they are consistent with these principles. However, given the complicated nature of parenting issues, some changes may fit better with some principles than do others. Governments have agreed to work together to address the negative consequences of separation and divorce. Any legislative reforms will be co-ordinated with the laws of all the provinces and territories and must respect the *Quebec Civil Code*.

About These Consultations

We encourage individuals and groups to read this consultation paper and answer the questions. The paper and the feedback booklet are also available on the Internet (see page 5 for the address).

There will also be consultations with various groups across the country on some of the issues raised in this paper. Some provinces and territories will conduct consultations on other issues that reflect local law and local service priorities.

These consultations result from the ongoing evaluation of the family law system in Canada by the federal, provincial and territorial governments. At the same time, government officials have been looking at how well the new child support guidelines are helping parents, lawyers, judges and others make decisions about child support. Recent research conducted on the governments' behalf provides important background information about many of the issues that are considered in this document, and it forms the basis for some of the proposed options for change. In some

sections, you will see a list of the titles of these research papers. Copies of these papers can be requested by calling 1-888-373-2222. You can find a complete list of the research and background papers that have been prepared in the appendices at the end of this document.

About This Document

This document is divided into two parts. The first covers issues related to parenting after separation or divorce, and the second deals with child support. Each part, in turn, contains several sections, each on a specific issue. There is background information and there are questions for you to answer in each section.

How to Provide Your Feedback

Please use the feedback booklet you received with this document to provide your comments. It is recommended that you consult the booklet as you read the information presented here. Each page in the feedback booklet refers to the corresponding page in this document.

For additional copies of this document and the feedback booklet, please call 1-888-373-2222. You will also find this document and the feedback booklet on the Internet at **http://www.canada.justice.gc.ca/en/ps/cca/index.html**

Once you have completed the feedback booklet, please return it in the enclosed postage-paid envelope.

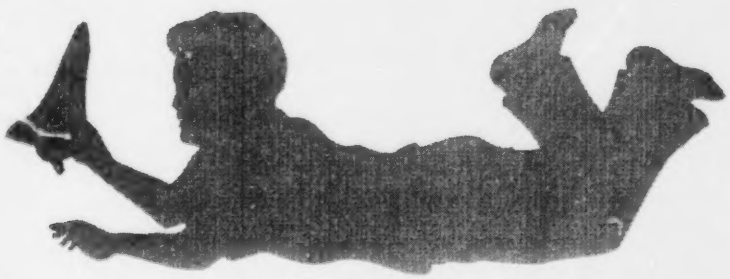
Input on custody, access and child support issues is welcome at any time, however we would appreciate that you return your feedback booklet by June 15, 2001.

Why We Want Your Feedback

Your comments will be used to inform the Family Law Committee's discussions on the child custody and access project and will form part of the background to the Report to Parliament that the federal Minister of Justice will table in 2002.

For More Information

For more information about this document and these consultations, or to order copies of the research reports, call 1-888-373-2222. The Department of Justice Canada's web site also contains helpful information on the topics this paper covers. You will find the site at **http://www.canada.justice.gc.ca/en/ps/cca/index.html**. The web site or information line for the government in your province or territory may also be able to provide you with more information.



PART 1:
PARENTING AFTER SEPARATION OR DIVORCE

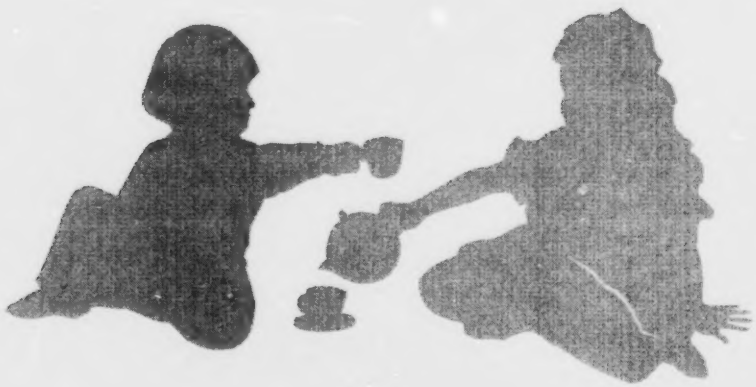
Introduction

Separating and divorcing parents have to deal with many important and difficult issues, including where their children will live and how they will make future decisions about their children. Each family situation is different and there are many competing interests involved.

This part of the consultation paper looks at six issues related to parenting after separation or divorce:

- Roles and responsibilities of parents
- Best interests of children
- Family violence
- High-conflict relationships
- Children's perspective
- Meeting access responsibilities

Each of the sections that follow looks at the laws related to the issue and asks questions about how governments might improve them. There are also questions about family law services to provide governments with a better understanding of the kinds of services that would best respond to the needs of people dealing with parenting after separation or divorce.



ROLES AND RESPONSIBILITIES OF PARENTS

Current Situation

When parents separate or divorce, they must work out how they will continue to carry out their parenting roles and responsibilities. Most separating and divorcing couples are able to agree and work out their own parenting arrangements. Others find it difficult to agree on issues such as where the children will live and who will be responsible for the children's day-to-day needs, schooling, religious education, and sports activities. It is even harder for parents to make decisions about their children when there is mental illness, substance-abuse, or violence between the parents or directed at the children.

Parents turn to the law for guidance when developing agreements on parenting arrangements and, when they cannot agree, to understand their options for resolving their disputes. The most common terms used in the law to describe parenting responsibilities are *custody and access*. However, the meaning, definitions and understanding of these terms vary across Canada and between the federal *Divorce Act* and provincial and territorial laws. Some provinces and territories also use other terms to describe the concept of parental responsibilities, such as *guardianship* and *parental authority*.

Currently the *Divorce Act* and provincial and territorial laws all require that decisions about custody and access be made based on the best interests of the children.

Further Reading

Custody and Access Terminology: Options for Legislative Change in B.C., prepared for the British Columbia Ministry of the Attorney General

Focus Groups on Family Law Issues Related to Custody and Access, S.A.G.E. Research Group

Divorce Reform and the Joint Exercise of Parental Authority: The Quebec Civil Law Perspective, Dominique Goubau, Professor, Faculty of Law, Laval University

**An Analysis of Options for Changes in the Legal Regulation of Child Custody and Access*, Brenda Cossman, Professor, Faculty of Law, University of Toronto

See page 5 for information on how to get copies of these research papers.

* Forthcoming

This allows for a wide range of parenting arrangements. Some children live all or most of the time with one parent. Others spend equal amounts of time with each of their parents. One parent may have responsibility for making decisions about the children, or the parents may share it.

With one exeption, the *Quebec Civil Code*, these laws do not assume that one parenting arrangement is better for children than another. Under Quebec law, whether custody is entrusted to one of the parents or to a third person, both parents are expected to continue to jointly exercise their parental responsibilities, unless the judge orders another parenting arrangement to meet the best interests of the children.

Is There a Need for a New Legal Approach?

The stress associated with separation and divorce can have a big impact on the health and well-being of children. Children have a harder time adjusting to new family situations when their parents cannot agree on parenting arrangements. Even though current laws promote the best interests of children and require that decisions that affect children put the children's needs and well-being first, some Canadians have criticized existing custody and access laws. Here are some examples of their concerns:

- The laws encourage too many parents to focus on their rights rather than on their responsibilities and, as a result, do not promote co-operative, child-focused parenting arrangements based on what is best for children.
- The terms *custody* and *access* promote the idea of a "winner" and a "loser." Some parents tend to think only about how they can get custody of the children instead of thinking about the specific parenting arrangements that need to be worked out.
- The varied meanings, definitions and understandings of the terminology contained in Canadian laws create confusion and uncertainty. Many people seem to think that the laws limit the types of arrangements that judges may order or parents may agree to.

These criticisms must be put into context. Legal responsibility for children rests with parents, and that responsibility is broad and near absolute. Current custody and access laws authorize judges to make custody orders based on the best interests of the children. These laws allow separating and divorcing parents to work out their own parenting arrangements, which can be incorporated into court orders. It is only necessary for parents to go to court when there are legal disputes they cannot resolve. In reality, most parents ultimately come to an agreement about parenting arrangements for their children, and only a very small number of cases end up with court-imposed custody orders.

In addition, it is important to be realistic about how much changing legislation can accomplish. Practically, the law is limited in its ability to change people's views or to resolve parental disputes, which are often only partly legal in nature. Several countries and U.S. states have made major changes to their custody and access laws in the past decade. Evaluation studies suggest that changing the law has not dramatically changed the way parents divide up their parenting responsibilities, nor has it resulted in fewer parenting disputes. It seems that legislative amendments can attempt to promote the idea of co-operative parenting, but cannot successfully force unwilling parents to co-operate.

Another challenge for governments developing legislative reforms relates to balancing the benefits of predictability and certainty with those of flexibility. While clear and consistent legal rules and predictable outcomes are important to promote agreements, encourage settlements and discourage parents' use of strategic or manipulative behaviour, these benefits must be balanced with the need for legislative flexibility. The unique characteristics of families and family members mean that each

separation and divorce experience is different. No one model of parenting has proven to be better than another for all children, and legislative flexibility is required to allow parents, professionals and judges to fully consider and respond properly to the concrete, individual interests of children in each case.

Please note that other sections of this document discuss related issues. You may find it useful to read the whole paper before answering any questions.

Looking at the Law

Laws such as the current *Divorce Act* are the primary source of authority for judges resolving disputes when parents cannot agree. However, many parents look to the law for guidance about how to work out arrangements for themselves. This section asks questions about what kind of legal provisions you think are needed to emphasize parental responsibilities rather than rights, and to help parents, judges, lawyers and other professionals make better decisions about children.

Before you begin, here are some key points to consider:

- The current law in most provinces and territories allows parents to agree to any kind of parenting arrangement that is in the best interests of their children.
- The approaches described below are not the only ones possible. You are invited to suggest any others that you think would be effective. Governments may select approaches in addition to the ones set out here for later development.
- It is important to consider the practical effects of any approach. For example, what other laws might be affected by a change in custody and access law? How will third parties who deal with children, such as teachers and doctors, interpret parenting arrangements?

There are five reform options we would like you to consider.

OPTION 1

Keep Current Legislative Terminology

Questions

Which of the options described below do you think would best help parents and judges make better decisions about parenting after separation or divorce?

OPTION 1

Keep Current Legislative Terminology

Maintain the existing terms, *custody* and *access*. Focus on developing and providing additional, improved family law services, and education and training about the wide range of parenting arrangements that are presently available. While many agreements and orders use the term *custody*, or *access*, they do not have to, as long as each parent's responsibilities are clearly described. The agreements and orders can refer to periods of access for the parent with whom the children do not usually live, or they may simply refer to dates and times when the children will be with that parent, without using the word *access* at all.

The objective of this option would be to improve, in a practical way, how parents, lawyers, judges and other professionals approach parenting roles and the resolution of family law disputes involving children. It would provide separating and divorcing families with the information and assistance they need, to understand the types of arrangements they can make for the care of their children, as well as education and training to help reduce parental conflict and to help protect children from some of the negative effects of their parents' separation and divorce.

This option would keep the existing terms *custody* and *access*, so there would be no impact on other existing laws that use or incorporate these terms.

OPTION 2

Clarify the Current Legislative Terminology: Define Custody Broadly

Maintain the existing terms *custody* and *access*, but define them differently. An open-ended list would set out the areas that make up *custody*, including the following:

- responsibility for meeting the children's daily needs, which include housing, food, clothing, physical care and grooming, and supervision;
- responsibility for making day-to-day decisions about the children; and
- responsibility for making major decisions concerning the children's well-being, decisions on matters such as residence, health care, education and religious upbringing.

The law would provide a framework for parents and judges to assign the aspects of custody to one parent alone or to both parents jointly, in a clear, understandable way. The parenting arrangement would not have to be described as sole or joint custody. Parenting agreements or court orders could use the word *custody*, but would not have to, as long as each parent's responsibilities are clearly described. The agreements and orders could refer to periods of access for the parent with whom the children do not usually live, or they may simply refer to dates and times when the children will be with that parent, without using the word *access* at all.

OPTION 2

Clarify the Current Legislative Terminology: Define Custody Broadly

OPTION 3

Clarify the Current Legislative Terminology: Define Custody Narrowly and Introduce the New Term and Concept of Parental Responsibility

OPTION 3

Clarify the Current Legislative Terminology: Define Custody Narrowly and Introduce the New Term and Concept of Parental Responsibility

Maintain the term *custody*, but restrict its meaning. Introduce the term *parental responsibility*, which would refer to the rights and responsibilities of parents for their children, including but not limited to the following:

- responsibility for meeting the children's daily needs, which include housing, food, clothing, physical care and grooming, and supervision;
- responsibility for making day-to-day decisions about the children; and
- responsibility for making major decisions concerning the children's well-being, decisions on matters such as residence, health care, education and religious upbringing.

Custody would be one narrow component of parental responsibility — the responsibility for maintaining a residence for the children.

Custody would determine the children's residence, but not how responsibility for making major decisions concerning the children would be exercised. Each parent would be responsible for the day-to-day care of the children and for making day-to-day decisions about the children when they are with that parent. Agreements or orders could assign some or all components of parental responsibility. These responsibilities could be assigned to one parent only or to both parents jointly, depending on what is best for the children, taking into account their particular circumstances.

OPTION 4

Replace the Current Legislative Terminology: Introduce the New Term and Concept of Parental Responsibility

Replace the terms *custody* and *access* in family laws with the new term and concept of *parental responsibility*. Judges would be authorized to issue a parental responsibility order, instead of a custody order, that would describe and allocate the exercising of specific aspects of parental responsibilities between parents. The legislation would not require that parenting responsibilities be divided equally or exercised co-operatively. The exercise of the various responsibilities could be allocated exclusively or proportionately, based on the best interests of the children. Some aspects could be exercised jointly by both parents, while either parent could exercise some aspects alone. When necessary to ensure the best interests of the children, one parent could be given the authority to exercise exclusive parental responsibility.

OPTION 4

Replace the Current Legislative Terminology: Introduce the New Term and Concept of Parental Responsibility

OPTION 5

Replace the Current Legislative Terminology: Introduce the New Term and Concept of Shared Parenting

OPTION 5

Replace the Current Legislative Terminology: Introduce the New Term and Concept of Shared Parenting

Introduce the term and concept of *shared parenting* into family laws. For example, the recommendation in the Special Joint Committee on Child Custody and Access report, *For the Sake of the Children*, defined shared parenting as including all the meanings, rights, obligations, and common-law and statutory interpretations embodied previously in the terms *custody* and *access*. This shared parenting approach would not mean that children must live an equal amount of time with each parent. The starting point for any parenting arrangement, however, would be that children would have extensive and regular interaction with both parents, and that parental rights and responsibilities, including all aspects of decision-making, would be shared equally or nearly equally between the parents. Parents wishing to begin from another starting point would have to show that shared parenting would not be in the children's best interests.

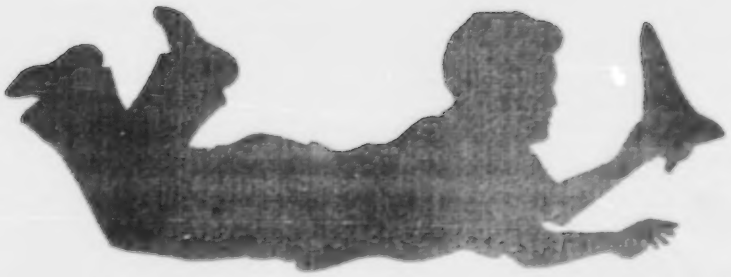
There are other possible ways the law might guide parenting after separation or divorce. Please describe in your feedback booklet any other options that you think would be effective.

LOOKING AT SERVICES

Separating and divorcing parents may need information and assistance to understand the types of arrangements they can make for the care of their children. Many people and organizations, such as lawyers, mediators, counsellors, public information programs, friends and family, can help parents deal with the complex financial, emotional and legal issues associated with separation and divorce.

Parent-education programs, mediation and counselling can help at the start of the process when parents are trying to agree on parenting arrangements that would be in the best interests of their children. The effective use of services can reduce parental conflict and protect children from some of the negative effects of their parents' separation and divorce. Research has shown that parental co-operation and low levels of conflict are in the best interests of children.

Once parents have an agreement or court order setting out their parenting arrangement, they may still require support, education, and counselling to work through the difficulties of their new situation. Even after the initial conflict is resolved, many parents may find it difficult to co-operate and abide by their parenting agreement.



Please check the six services from the list below that you think are most important for helping families involved in separation and divorce.

Information Services

- ❒ Parent education: these programs help separating and divorcing parents understand the legal, personal, and parenting issues that arise during separation and divorce. They also provide information on the ways separating and divorcing parents may care for their children.

- ❒ Public and family law information centres: these centres offer a range of written materials and videos on separation and divorce. They may also provide services for parents and children.

- ❒ Self-help materials, kits or public information documents on parenting roles: these are available in a number of public places, including courthouses, depending on the province or territory. A parenting-skills workbook on separation and divorce issues for families, for example, might help parents develop positive parenting, communication and conflict-resolution skills, and assist parents in resolving disputes and developing a parenting plan.

- ❒ Information programs for children: these programs help children understand and respond to issues that affect their care and their relationships with parents and others.

Support Services or Approaches

- ❒ Counselling for parents: this covers anger management, conflict resolution, debt reduction, substance abuse, and employment.

- ❒ Legal aid: this service provides legal advice or representation to financially eligible parents.

- ❒ Child advocates or child legal representatives: child advocates may intervene in a broad range of family matters, including custody and access proceedings to promote the interests and well-being of children. Children's representatives present the children's views and preferences on parenting arrangements.

- ❒ Special courts: these deal only with family and children's matters.

- ❒ Supervised access and exchange centres: these centres offer a safe, supervised environment for children's access and for parents to drop off and pick up their children.

Dispute Resolution Services

- ❒ Mediation: parents who have relatively equal bargaining power work with a neutral person to reach an agreement on parenting arrangements.

- ❒ Assessments: when parents cannot agree on custody and access arrangements, a judge may order or the parents may accept an independent expert, such as a psychologist or social worker, to assess the parents' and children's situation.

- ❒ Case managers and workers: these people help parents review their written agreement or court order regularly, to see if there are problems or changes in circumstances that need to be addressed.

If you have had any personal experience with any of these services, please comment in your feedback booklet on how useful the services were in encouraging parents to make their own parenting arrangement, and to focus on the needs and best interests of their children.

Please also describe in your feedback booklet any other family law services that you think would be useful to help clarify parental roles and responsibilities, and to encourage parents' positive involvement and co-operation.

BEST INTERESTS OF CHILDREN

Family laws in Canada are based on the principle of the "best interests of the child." Those people making decisions that affect children during and after separation and divorce must take the children's best interests into account.

Some, but not all, provincial and territorial laws list specific factors that parents are to look at when making decisions about their children. These factors include children's ages, special needs, relationships with the important people in their lives, the role of extended family, cultural issues, the history of the parenting of these children and the future plans for the children.

Currently, the federal *Divorce Act* does not set out factors that parents should consider when determining the best interests of children. Some people think that it should. A list of factors might educate people about the things that they should consider when making decisions that affect children.

Further Reading

Focus Groups on Family Law Issues Related to Custody and Access, S.A.G.E. Research Group

See page 5 for information on how to get copies of this research paper.

There are varying opinions on this issue. Some say that listing factors would not increase the predictability of outcomes nor decrease litigation. In fact, in comparing jurisdictions that have a list of factors with those that do not, there is little real difference in the types of orders issued. Adding a few key factors could be helpful, but having too many might be too long and difficult to be useful.

This section looks at whether adding factors to the section of the *Divorce Act* that covers "best interests of the child" would be helpful and, if so, what those factors could be.

Looking at the Law

Do you think that adding factors to the "best interests" section of the *Divorce Act* would help people make decisions about children that are in the children's best interests?

- ❒ Yes
- ❒ No

Why?

If yes, please check the 10 factors from the list below that you think are most important in helping people make decisions that are in the best interests of children.

Factors Related to the Children Themselves

- ❒ Children's age and stage of development
- ❒ Children's health
- ❒ Children's special needs
- ❒ Children's cultural, ethnic, and religious or spiritual background
- ❒ Children's views and preferences
- ❒ Children's personalities and abilities to adjust to the new way their parents have arranged to care for them
- ❒ Children's current and future educational requirements

Factors Related to the Children's Relationships with Others

- ❒ Relationships with siblings
- ❒ Relationships with parents
- ❒ Relationships with other members of the family
- ❒ Relationships with any person involved in the children's care and upbringing
- ❒ Relationships with the community

Factors Related to Parenting of the Children in the Past

- ❒ History of the parenting of the children
- ❒ Past conduct of parents that is relevant to their parenting abilities (including violence and abuse in intimate relationships)

Factors Related to the Future of the Children

- ❒ Ability of parents to meet ongoing and developmental needs
- ❒ Ability of parents and other involved people to co-operate
- ❒ Potential for future conflict
- ❒ Potential for future violence affecting the child

Please describe in your feedback booklet any other key factors that you think would help people make decisions that are in the best interests of children.

FAMILY VIOLENCE

Family violence can take many forms, including physical violence or threats, sexual abuse, and emotional or psychological harm. Children can experience family violence directly as victims of abuse by a parent or sibling. They can also experience violence indirectly as witnesses to violence by a parent against another family member. Sometimes they experience both.

Family violence in any form is particularly harmful to children, no matter how they experience it. Research has shown that children who witness violence by one parent against the other often suffer emotional trauma, find it hard to deal with others, show increased aggression, have fewer close emotional ties, and experience disrupted parenting. These children are also at greater risk of becoming victims and perpetrators of violence themselves.

The presence of family violence can make the issues and choices separating or divorcing parents face even more complex. It is important for governments to ask Canadians about family violence – to help them assess what impact the presence of past or current family violence should have in determining the roles and responsibilities of parents at the time of separation or divorce.

There are ways in which the legal system could respond to the presence of family violence when parents are separating or divorcing, including the following:

- Specialized assistance or services could be provided to these families. Currently, provinces and territories already provide such services in emergencies through shelters and transition homes. Long-term counselling and support programs are also available.
- The law could offer specialized assistance to victims of domestic violence. Currently, certain provinces and territories have legislation in place that defines family violence in order to offer victims a higher level of protection through such measures as emergency protection orders.
- The law could state whether or not family violence would be a relevant consideration when making parenting arrangements and, if so, under what circumstances and to what extent.

Most provincial and territorial family laws do not specifically say that judges must take family violence into account when resolving parenting disputes. However, judges often do. Only the laws in Newfoundland and the Northwest Territories require a judge hearing a custody or access application to take family violence into account. For example, the Newfoundland *Children's Law Act* requires judges to consider whether a person has ever acted violently towards his or her spouse or child when assessing that person's ability to act as a parent.

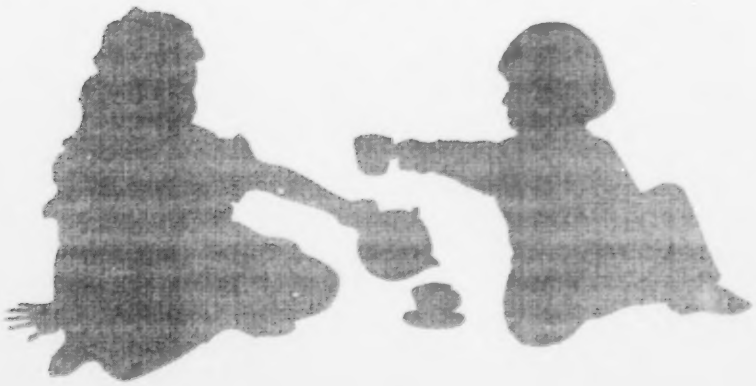
Currently, the *Divorce Act* says that, after divorce, children should have as much contact with each parent as is consistent with their best interests. The law also says that judges must take into account the willingness of each parent to facilitate contact between the children and the other parent when making parenting decisions.

The provision reflects a general assumption that the needs and interests of the children are best met when the children maintain significant contact with both parents. This principle has been controversial. Some have argued that this provision, known as the "maximum contact provision," is unfair and creates dangerous situations because it does not require judges to think about the possibility of family violence.

Here are some examples of how family violence is being taken into account in parenting arrangements around the world:

- The Australian *Family Law Act* includes family violence as one of a number of factors to consider when determining children's best interests.
- New Zealand and several American states have provisions in their laws, referred to as "rebuttable presumptions," that limit a violent parent's role in his or her children's lives, unless the parent can prove that such a limit is not in the children's best interests. The degree to which the parent's role is limited varies. Judges in New Zealand, for example, generally do not order custody or access, other than supervised access, to a violent parent.
- The law in California uses a combination of approaches. It contains a general statement that exposure to violence harms children; includes family violence as a factor to be considered when determining children's best interests; and has a rebuttable presumption against ordering custody to a violent parent.

This section looks at how governments could respond to situations of family violence when parenting decisions are being made.



Looking at the Law

There are several approaches governments could take to promote child-centred decision-making in situations of violence to ensure the safety of children and others. Which of the following approaches would best serve that purpose?

- ❒ Make no change to the current law.
- ❒ Include a general statement in the law that acknowledges that children who are victims of violence or who witness violence are negatively affected, and that family violence poses a serious safety concern for parents and children.
- ❒ Make family violence a specific factor that must be considered when looking at children's best interests, and when making parenting decisions. The degree to which contact and decision-making are limited could be set out in the law or left to the judge to decide.
- ❒ Establish a rebuttable presumption of limited parental contact and a limited decision-making role for a parent who has committed family violence. This means that, when a parent has committed family violence, his or her contact with the children, as well as his or her role in making decisions concerning the children, will be limited in some way, unless the parent can prove that this would not be in the children's best interests.
- ❒ Restrict the impact of the "maximum contact" provision by moving the principle from section 16(10) of the *Divorce Act* into the section that deals with the "best interests of the child." This way, judges would balance the principle of maximum contact with other important criteria related to the best interests of children. Within the context of family violence, judges would not take into account the willingness of each parent to facilitate contact between the children and the other parent. This helps the victim of abuse not to be afraid to raise the issue of violence.

❒ A combination of the above. Please specify in your feedback booklet which of the approaches you would combine.

Please describe in your feedback booklet any other legislative approaches that you think would be helpful to ensure that family violence is taken into account when parenting decisions are being made on separation or divorce.

Looking at Services

Please check the six services from the list below that you think are most effective in ensuring that the issue of family violence is addressed when parenting decisions are being made after separation or divorce.

Information and Education Services

❒ Education on family violence for parents and children: this usually involves workshop-type sessions to improve parents' and children's understanding of the impact of family violence.

❒ Information for professionals: this refers to resource material that is distributed to individuals and organizations such as judges, family-law lawyers, mediators, law libraries, law associations, public libraries, family-service organizations, resource centres and all family-court offices. This could also include training sessions for professionals.

Support Services

❒ Counselling for children: this usually consists of programs that children can attend to focus on issues that relate to witnessing conflict and violence.

❒ Counselling for parents: this covers anger management, conflict resolution, debt reduction, substance abuse and employment.

❒ Legal aid: this service provides legal advice or representation to financially eligible parents.

- ❒ Psychological assessments: these identify and provide understandings of children's needs and the parents' willingness and ability to meet those needs. The assessor's recommendations may help parents reach a settlement or help a judge make an order.

- ❒ Supervised access and exchange centres: these offer a safe, supervised environment for children's access and for parents to drop off and pick up their children.

- ❒ Psychological services for parents and children.

- ❒ Partner-assault response programs: these offer group-counselling for the assaulting partner and teach alternate means of dealing with conflict. These programs are often a compulsory component of a criminal conviction for domestic assault.

Other Services

- ❒ Expedited court procedures: a finding of family violence places the court case in a faster stream for resolution. In addition, parents do not have to go to mediation, and they take different parent-education programs from those other parents attend.

If you have had any personal experience with any of these services, please comment in your feedback booklet on how useful the services were in ensuring that family violence is taken into account when parenting decisions are being made.

Please describe in your feedback booklet any other family law services that you think would be useful to ensure that family violence is taken into account when parenting decisions are being made.

HIGH-CONFLICT RELATIONSHIPS

Almost all couples experience some level of conflict during separation and divorce. The degree of interpersonal and legal conflict varies widely and conflict levels can change depending on the issues the parents are dealing with. Conflict can range from one parent belittling the other parent's values to vicious verbal attacks and threats of violence, and can be as extreme as direct threats to the emotional well-being and physical safety of the children, or either parent.

Exact numbers are not known, but research suggests that about 10-to-15 percent of all couples exhibit a high level of legal and interpersonal conflict around the time of separation or divorce. The longer it takes to sort out the issues raised by the separation or divorce, the greater the chance that the conflict will continue and get worse. For some, high levels of conflict continue for years. High-conflict parents may have serious underlying problems, such as emotional, mental-health or substance-abuse problems. High-conflict cases consume a large amount of court time and services.

Research also shows that the level and intensity of parental conflict is a very important factor in children's adjustment after separation or divorce. Parents who co-operate after they separate increase the chances that their children will have close relationships with both of them and will cope successfully with the separation or divorce. Parental conflict and lack of co-operation have a negative effect on children's adjustment after separation or divorce.

Further Reading

Assessing, Serving and Maintaining Parenting Arrangements for High-Conflict Families, Charlene LaFleur-Graham, Policy Planning and Evaluation, Saskatchewan Justice

Allegations of Child Abuse in the Context of Parental Separation: A Discussion Paper, Canadian Research Institute for Law and the Family

**The Early Identification and Streaming of Cases of High-Conflict Separation and Divorce: Review,* Ron Stewart, Family Therapy Associates

See page 5 for information on how to get copies of these research papers.

* Forthcoming

When the parents' interpersonal struggles take centre stage, children's needs are not given adequate attention.

The more intense, pervasive and open the conflict between the parents, the greater the damage to children. Equally damaging is a situation in which the children are encouraged to take sides or report on a parent, because they become the focus of, and the unwilling participants in the conflict. When there is a very high level of conflict, disputes may involve false allegations of abuse, parental alienation (when one parent actively attempts to exclude the other parent from the children's lives), or even abduction of the children by a parent.

High-conflict parents may also have difficulty seeing their children's needs as separate from their own and have long-term difficulty

co-parenting and communicating with one another about their children after separation or divorce. These parents may also rely too much on their children to meet their emotional needs.

It has been suggested that improvements to the family law system are required to protect children from the negative effects of high levels of conflict between their parents. Specific approaches that have been tried include parent education programs for high-conflict parents, supervised access and exchange centres, and intensive court management of high-conflict cases.

Looking at the Law

While federal and provincial laws may differ in wording and style, they all use the "best interests of the child" principle to determine parenting arrangements. There are currently no specific provisions to deal with high-conflict situations.

There are a number of approaches governments could take to promote child-centred decision-making in high-conflict cases. Which of the following approaches would best do this?

- ❒ The law should include no specific provision. Changes to address high-conflict cases could have negative effects on the majority of parents who co-operate. The focus should instead be on making changes to support parents who can reach co-operative solutions.

- ❒ The law should say that, when judges are concerned about ongoing high-conflict parenting disputes, they should be able to set out in the court order very specific and detailed parenting arrangements to provide a regular routine and autonomy for each parent's time with the children.

- ❒ The law should say that, when judges are concerned about ongoing high-conflict parenting disputes, they should be able to specify in the court order a dispute-resolution mechanism that the parents are to use.

- ❒ The law should discourage arrangements requiring co-operation and joint decision-making when there are concerns about ongoing high-conflict parenting disputes. The law could say that these arrangements would not be in children's best interests.

- ❒ The law should include a combination of the above approaches. (Please specify in your feedback booklet which of the approaches you would combine.)

Please describe in your feedback booklet any other legislative approaches that you think would be helpful to address high-conflict situations.

Looking at Services

Please check the six services from the list below that you think would be most effective in helping parents avoid high levels of conflict and minimizing the harmful effects of conflict on children.

Information and Education Services

- ❒ Parent education: specialized programs for high-conflict parents that provide information about the negative effects of ongoing conflict on children, and include parenting and conflict-resolution skills training.

- ❒ Education and support groups for children: these help children understand and cope with the high-conflict situation.

Services to Promote Prompt Handling of High-Conflict Cases

- ❒ Intake co-ordinators: properly trained front-line court workers who facilitate early identification of high-conflict cases and referral to services.

- ❒ Specialized case management and controlled court procedures for high-conflict cases, along with access to clinical expertise to facilitate faster final decisions.

Support Services for Parents and Children

- ❒ Legal aid: this service provides legal advice or representation to financially eligible parents.
- ❒ Supervised access and exchange centres: these offer a safe, supervised environment for children's access and for parents to drop off and pick up their children.
- ❒ Therapeutic access centres: these offer intervention by a mental-health professional as part of the visit.
- ❒ Specialized therapeutic mediation: parents who have rigid and very different ideas about their children's needs and those who have a general distrust of each other do not succeed in reaching an agreement through mediation. These parents require a more therapeutic or impasse-directed mediation process, that brings counselling and mediation together. This approach allows parents to focus on resolving deeper issues, so they can reach sound agreements based on proper negotiation strategies and make psychologically sound arrangements. Interventions include counselling and specialized assessment and evaluation procedures.
- ❒ Initial and ongoing psychological intervention and assessments: professionals determine the level and cause of conflict and the level of risk associated with the conflict, and suggest responses to help the parents reduce the level of conflict.
- ❒ Programs to promote a self-managed parenting plan: parents can directly or indirectly agree on parenting details to avoid misunderstandings or to establish communication rules.

If you have had any personal experience with any of these services, please comment in your feedback booklet on how useful the services were in reducing conflict and helping parents focus on the needs of the children.

Please describe in your feedback booklet any other family law services that you think would be useful to reduce conflict and help parents focus on the needs of the children.

CHILDREN'S PERSPECTIVES

Children are directly affected by decisions parents and judges make during separation and divorce. Understanding the children's perspectives of the way parents propose to care for them is essential if children's best interests are to remain the central focus of decision-making. There are varying opinions, however, about when and how to best hear children's views.

There are several aspects of this issue that need to be considered. One relates to decisions about how children's views should be heard when parents are negotiating their own agreement or are going through mediation. It is important for children's well-being that parents learn how to listen to their wishes and take them into account when making decisions, without making the children decision-makers. Parents should consider factors such as the age and maturity of the children, their ability to communicate, and their emotional state. Discussing living arrangements with children without making them decision-makers will allow them to feel that they are being listened to, and may even help ensure that the agreement between their parents lasts longer.

Another aspect of the issue is how governments can provide for children's input into legal proceedings. Article 12 of the *United Nations Convention on the Rights of the Child*, which Canada signed in 1991, reads as follows:

1. State parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Further Reading

The Voice of the Child in Divorce, Custody and Access Proceedings, Ronda Bessner, Legal and Policy Consultant

See page 5 for information on how to get copies of this research paper.

This means that governments should recognize that children who are capable of forming their own views, depending on their age and maturity, have the right to participate in a meaningful way in decisions that affect their lives. This participation may be direct (the children speak for themselves) or indirect (someone else presents the children's views or interests).

In Canada, the family law system currently provides a number of ways children's perspectives may be heard, including having judges speak directly with the children, custody and access assessments, and through lawyers or others representing children's interests.

Some provinces and territories have models of legal representation for children, including the following:

- The child advocate or lawyer: a lawyer represents children in cases that meet specific guidelines and criteria. Children are treated as clients and the lawyer ensures that each child's interests, wishes and preferences, along with relevant evidence about the child, are communicated to and understood by everyone involved.
- The *amicus curiae*, or friend of the court: a neutral person appointed by a judge does not act as an advocate for the children, but rather helps the judge by gathering relevant information and expert reports about the facts of the case and the circumstances and best interests of the children.
- The family advocate: government-appointed lawyers who act in children's best interests. The children are not clients.

Looking at Services and Approaches

Please check the five services from the list below that you think would be most effective in ensuring that children's perspectives are heard and understood.

❒ Psychological assessments: prepared by a professional, these identify and provide an understanding of the children's needs, views and preferences. The assessment report may help parents reach a settlement, or help the judge if they go to court.

❒ Parent education: these programs explain the importance of hearing and understanding the children's perspectives on how parents will divide parenting roles and responsibilities.

❒ Education and support groups for children: these help children cope with their parents' separation or divorce.

- ❒ Workbooks, self-help kits and parenting plan models: these cover considerations and options to encourage parents to appropriately involve their children in discussions about parenting arrangements, either directly or through a representative.

- ❒ Guidelines or training for mediators: these help ensure mediators consider the children's perspectives when developing mediation agreements with parents.

- ❒ Specific training for lawyers and others who work with children: this helps ensure that these professionals are qualified to work with children and understand or interpret their views.

- ❒ Legal or other representation for children involved in disputes about parenting after separation or divorce.

- ❒ Special courts: these deal only with family and children's matters.

- ❒ Dispute-resolution processes such as mediation: these services and approaches encourage parents to consider when children should be present for discussions, or when it is appropriate for them to participate in decisions about parenting.

If you have had any personal experience with any of these services, please comment in your feedback booklet on how useful the services were in ensuring that children's perspectives were considered when decisions were being made about the way parents would care for them.

Please describe in your feedback booklet any other family law services that you think would be useful to help ensure children's perspectives are considered when parenting decisions are being made.

In what circumstances should legal or other representation be provided for children?

MEETING ACCESS RESPONSIBILITIES

Problems arise when parents fail to abide by the terms of their written agreement or court order and deny access or fail to exercise access rights. This may happen for many reasons, including a misunderstanding about what the agreement or order requires parents to do.

Access problems can range from relatively minor incidents of access being denied on a particular occasion, because the children are ill, for example, to serious high-conflict disputes between parents. Disruption of the parent-child bond through a parent's failure to exercise access is also a significant problem. Research shows that serious problems with access are much more likely to occur when there is a history of abuse or high conflict between the parents.

While approaches differ, many provinces and territories have specific laws regarding access enforcement. Provincial and territorial enforcement rules apply to court orders made under the federal *Divorce Act*.

There are several ways to deal with access problems. These include supervised access, mediation, court-ordered assessment reports, scheduled time to make up for lost access time, reimbursement of expenses, variation of the custody order, and fines or imprisonment to respond to deliberate, unreasonable non-compliance. However, judges rarely imprison parents as they do not see it to be in the children's best interests.

Further Reading

**Overview and Assessment of Approaches to Access Enforcement*, Martha Baily, Faculty of Law, Queen's University

**The Problem of Access: Legal Approaches and Program Supports*, Pauline O'Connor, Policy Research Consultant

Use of Dispute Resolution in Access Enforcement Effectiveness, Description of Models, and Policy Issues, prepared for the British Columbia Ministry of the Attorney General

See page 5 for information on how to get copies of these research papers.

* Forthcoming

Currently, applying the "best interests of the child" principle appears to be an important factor in how judges decide on appropriate enforcement measures. Responding to access issues is generally acknowledged to be very different from enforcing a support or judgment debt.

Similarly, there is reluctance to link the obligation to pay support to the entitlement to or exercise of access because it is not usually considered to be consistent with the best interests of children. The prevailing view appears to be that it is not generally in the best interests of children to force an unwilling parent to visit them.

Access is the children's right. Parents' interests should not take priority over children's best interests when it comes to enforcing access. This section looks at how laws and services dealing with access enforcement can protect children's rights and best interests most effectively.

Looking at Services

Please check any one or more of the following services that you think would be most effective in encouraging parents to live up to their parenting responsibilities.

- ❒ Parent education: these programs help improve communication between parents and help them better understand their respective responsibilities to their children at the time the access order is made.
- ❒ Parenting skills courses: these programs help alleviate concerns about the capacity of parents to properly care for their children, and help parents establish an ongoing support network.
- ❒ Counselling: counselling sessions can help parents deal with underlying problems.
- ❒ Model access orders: these help people develop clear and appropriate access orders.
- ❒ Public education: these courses teach people the consequences of not complying with court orders.
- ❒ Early identification, screening and assessment of difficult cases: these procedures help identify difficult cases and refer parents to appropriate services.
- ❒ Assessment: this service helps determine the children's current needs and circumstances.
- ❒ Supervised access and exchange centres: these offer a safe, supervised environment for children's access and for parents to pick up and drop off their children.
- ❒ Legal aid: this service provides legal advice or representation to financially eligible parents.
- ❒ Special courts: these deal only with family and children's matters.

If you have had any personal experience with any of these services, please comment in your feedback booklet on how useful the services were in ensuring parents lived up to their parenting responsibilities.

Please describe in your feedback booklet any other family law services that you think would be useful to help ensure parents fulfill their parenting responsibilities.

Looking at the Law

Please check any one or more of the following legislative approaches that you think would be most effective in encouraging compliance with access orders.

- ❒ Require the non-complying parent to give the other parent access to the children to make up for the time he or she missed.
- ❒ Require the non-complying parent to deposit money or other valuables with the court, which the parent would forfeit if he or she fails to allow access.
- ❒ Require either parent and/or the children to attend an educational seminar, parenting course, counselling or other similar type of session, and provide proof that they did.
- ❒ Allow the judge to appoint a mediator to help resolve the dispute.
- ❒ Require the non-complying parent to reimburse the other parent for any costs he or she has as a result of the denial of access.
- ❒ Fine the non-complying parent an amount for each day that access has been or is being denied, up to a maximum. If the parent does not pay, the judge may order that he or she be sent to prison for up to a maximum time.

- ❒ Imprison the non-complying parent continuously or intermittently, up to a maximum time, for denying access.
- ❒ Direct an enforcement officer to help a parent obtain access to the children when the judge is satisfied, based on the non-complying parent's history of denying access or other grounds, that he or she will deny access.
- ❒ Direct either or both parents to do anything the judge considers appropriate in the circumstances to encourage them to comply with the access order.

Please describe in your feedback booklet any other legislative approaches that you think would be useful to encourage parents to fulfill their parenting responsibilities.

PART 2:
CHILD SUPPORT

Child support guidelines are rules and tables that help parents and others figure out how much child support a parent will pay after separation or divorce. The guidelines were developed to help parents predict the amount of child support a judge would likely set, and to ensure that children in similar situations are all treated the same when it comes to child support. The *Divorce Act* and most provincial and territorial laws include guidelines. It is important to note that Quebec has adopted its own child support guidelines and, as a result, certain questions in this consultation paper do not apply to Quebec's guidelines.

As part of the legislation that made the child support guidelines law, the federal Minister of Justice committed to reviewing the guidelines and reporting back to Parliament about them in May 2002. To gather information for this review, federal government officials meet regularly with their provincial and territorial counterparts, with the legal community through organizations such as the Canadian Bar Association, and with the public, parents and other interested parties, through formal and informal consultations.

This part of the consultation paper looks at four issues related to child support:

- child support in shared custody situations;
- the impact of access costs on child support amounts;
- child support for children at or over the age of majority; and
- child support obligations of a spouse who stands in the place of a parent.

Each issue is discussed in a separate section, which contains background information on the issue, sets out the specific points of concern, and reviews what governments have heard on the issue from various parties over the years. Each section also contains a series of questions for you to answer in your feedback booklet.

CHILD SUPPORT IN SHARED CUSTODY SITUATIONS

When children live with each parent close to the same amount of time after separation or divorce, the overall parenting costs are higher. This is partly because both parents in these shared custody situations often have to provide a home for the children. The parents may also each have expenses for other important items such as food, transportation and clothing.

Currently, the child support guidelines have a special rule for determining the amount of child support in shared custody situations. To use the shared custody rule, a parent must exercise access to, or have physical custody of the children for 40 percent or more of the time in a year. This rule sets out the factors that parents and others should consider when determining the child support amount (such as the extra costs and unique aspects of shared custody arrangements) while maintaining flexibility.

This section looks at two issues related to child support and shared custody situations. The first is how to decide whether the parents really have a shared custody arrangement. The second is determining the child support amount.

Determining Whether the Shared Custody Rule Applies

Some people say there are problems with using only time to determine whether the shared custody rule applies. In particular, they say that the rule links the amount of child support with the amount of time a parent spends with his or her children. Many people believe that this causes parents to fight over the amount of time they each spend with the children, and that these disputes are much more difficult to resolve than disputes over child support issues because of the emotions involved.

In fact, the shared custody rule was not intended to change the long-standing legal principle that child support and custody are unique issues that parents should deal with separately. Parenting arrangements should be based on what is best for children, not on what will benefit either parent financially.

Some people say judges should look at factors other than time when deciding whether the shared custody rule applies. This is because they believe that there is more to parenting than just how much time parents spend with the children. Other factors judges could look at include how the parents share the children's expenses, whether the children have two main homes, and which parent looks after the children's needs.

On the other hand, some people argue that adding more factors would only complicate things. More factors would mean more things for parents possibly to fight about, making agreements harder to reach and perhaps leading to longer and more expensive court procedures.

Still other people feel that time should not be a factor that judges consider when determining whether the shared custody rule applies.

Below, you can tell us which factors you think judges should use to determine whether the shared custody rule applies.

A related problem, as some people and judges have commented, is that the 40 percent figure in the shared custody rule is arbitrary and the amount of time parents spend with the children is hard to determine accurately. In fact, the guidelines provide no instructions for calculating it. In addition, it is the *actual* amount of time that parents spend with the children that judges look at, not what the written agreement or court order says. Some people feel that it would be better to make the definition of the time element more flexible, and give judges more discretion when deciding whether the shared custody rule applies.

Questions

What factors do you think judges should look at when deciding whether the shared custody rule applies?

- ❒ Judges should look only at the amount of time each parent spends with the children.
- ❒ Judges should look at several factors, including time. Other factors could include whether the child has two main homes, and how parents share the children's expenses and child-care responsibilities such as direct care and supervision, arrangements for health care, school, daycare, out-of-school care and extracurricular activities, supervision of homework, and purchase and maintenance of clothing.
- ❒ Judges should not look at the amount of time each parent spends with the children. They should look only at factors related to how the parents share responsibility for the children's expenses and share child-care responsibilities, such as those described above.
- ❒ Other (please explain)

Why?

If time continues to be a factor that judges look at when deciding whether the shared custody rule applies, what is the best way to define it?

- ❒ The children must spend at least 40 percent of their time with each parent.
- ❒ The children must spend "substantially equal" time with each parent.
- ❒ Other (please explain).

Why ?

Determining the Child Support Amount

Under the child support guidelines, judges must look at three things when determining the amount of child support in shared custody situations:

- the amount set out in the provincial and territorial child support tables, by income, for each parent;
- the increased costs of the shared custody arrangement; and
- the means and needs of the parents and the children.

Judges have wide discretion when deciding the child support amount in shared custody situations. This is because shared custody situations include many parenting arrangements. The costs to each of the

parents can vary greatly depending on the exact nature of their parenting arrangement.
Figuring out how to calculate the child support amount in shared custody situations can be very difficult and many people have suggested ways to make it simpler.

Questions

Which of the methods below for determining the child support amount do you think would work the best for parents in shared custody situations? You may choose more than one of these methods.

A. Some people believe that, when parents share physical custody of their children equally, neither parent should pay child support.

B. Others argue that the child support amount should be set to make the standard of living of both households the same.

C. Many people think that a formula would be the best way to recognize the increased costs of a shared custody arrangement.

D. Others believe that judges should have discretion, as they do now, when setting the amount of support, because a formula may not apply fairly across the range of the many parenting arrangements families with shared custody have.

E. Another option is for judges to look at lists the parents prepare of their expenses related to the children. This is what judges did before the child support guidelines were introduced.

Why?

Please describe in your feedback booklet any other method you think would be effective and explain why it would work.

IMPACT OF ACCESS COSTS ON CHILD SUPPORT AMOUNTS

There are two types of costs parents have, related to access:

- costs related to the *time* a parent has with the children; and
- *expenses* the parent has, to exercise access.

Costs for access time tend to reflect the *amount* of time a parent spends with the children. When the parent who pays child support spends a lot of time with the children, he or she might have significant costs for this access. On the other hand, when the paying parent spends little or no time with the children, the receiving parent may have financial and hidden costs on top of his or her regular costs. Examples of hidden costs include loss of career-advancement opportunities and reduced ability to earn overtime pay.

Access expenses are usually *large lump-sum amounts* the paying parent has to pay to exercise access. An example of these expenses is airfare for the parent or the children when the two parents do not live near one another.

When parents have unusually high access costs (either related to time or large expenses), the guidelines provide a way that parents can try to accommodate them. When such costs, combined with the amount of support the parent pays according to the child support tables, could create hardship for either parent or for the children, a parent can use a section of the child support guidelines to get the child support amount changed.

The parent claiming undue hardship has to prove to a judge that the hardship he or she would suffer is significant (undue) and that his or her household's standard of living is not higher than that of the other parent's household. If the parent's claim is successful, the judge might then lower the child support amount to take into account the paying parent's unusually high access costs.

Parents, judges and others have said that there are problems with the undue-hardship process. In particular, the calculations the parents have to do to evaluate their standard of living are complicated. It is also hard to assign a dollar amount to elements of a person's standard of living.

Given these challenges, some people have said that there needs to be another, simpler way to take access costs into account when deciding on child support.

Other people, who feel that the undue-hardship process is not the best way to deal with access costs, see problems for the receiving parent when the paying parent exercises very little or no access. These people say that the undue-hardship process does nothing to help receiving parents who may have extra expenses related to the children because the other parent does not have the children very often. The undue-hardship process is not effective for these parents because, although case law recognizes that receiving parents may make an undue-hardship claim, most have been unsuccessful, again because it is difficult to determine the exact dollar amount of the expenses in question.

Still other people have said that undue hardship should not be changed to automatically decrease the child support amount when the paying parent exercises access often, since the receiving parent's expenses may not decrease. An increase in a paying parent's access time may have little or no impact on the receiving parent's major expenses, such as housing.

Judges have dealt with access costs in ways other than those in the guidelines. In some cases, judges have shared these costs between the parents as part of the access order. That way, judges do not change the child support amount, and the parents can decide between themselves whether the receiving parent's share of the access costs will be paid by deducting it from the child support amount, or some other way.

Costs Related to Access Time

The child support guidelines recognize that the paying parent's costs related to access time are offset by the receiving parent's direct and hidden costs. As a result, judges do not tend to adjust the child support amount to accommodate most parents' access costs.

However, some parents who care for children close to 40 percent of the time over a year believe they should not have to pay the full child support amount. Others believe that reducing child support amounts according to access time could lead to more litigation.

If the guidelines did include another approach, there is the question of what that approach would be. Any approach that includes a formula would necessarily require trade-offs between simplicity and fairness. It may also be difficult to determine how much time a parent must care for the children before the amount of child support can be changed, given the fact that the guidelines already recognize that a paying parent will spend time with the children. It is difficult to implement perfect mathematical solutions in a simple, user-friendly manner. A complex formula may appear to be so complicated that judges will not use it at all, or it may result in incorrect calculations. On the other hand, simpler mathematics may lead to less accurate results.

Below are questions about whether the child support guidelines should provide a different way to take unusually high or unusually low access costs into account when determining the child support amount.

Questions

Should the child support guidelines be changed to introduce a new way to take into account the costs related to *unusually high* access time when determining child support?

❒ Yes

❒ No

Why?

If yes, how should the child support amount be calculated?

❒ It should be left to the judge's discretion.

❒ There should be a formula. The judge should have no discretion.

❒ There should be a formula to help the judge, but he or she should still have discretion whether or not to change the child support amount.

❒ Other (please explain).

Why?

Should the child support guidelines be changed to introduce a new way to take into account the costs related to *unusually low* access time when determining child support?

- ❒ Yes
- ❒ No

Why?

If yes, how should the child support amount be calculated?

- ❒ It should be left to the judge's discretion.
- ❒ There should be a formula. The judge should have no discretion.
- ❒ There should be a formula to help the judge, but he or she should still have discretion whether or not to change the child support amount.
- ❒ Other (please explain).

Why?

Access Expenses

There are varying opinions on whether child support amounts should take into account the fact that the paying parent may have high access expenses, such as airfare and hotel bills.

For example, some people say that, especially in low-income situations, children's basic needs are of first importance. Parents must be able to meet their children's basic expenses for food and housing. Only then should a judge be able to consider changing the child support amount to take into account high access expenses.

Another issue related to high access expenses is that paying parents must deal with them in the undue hardship section of the child support guidelines, which makes it difficult for them to obtain relief. Because the hardship must be undue and because the standard of living of the paying parent's household must be lower than that of the receiving parent's household, it is very difficult to get a judge to agree to reduce the child support amount to reflect high access expenses. Faced with these major expenses, paying parents might be able to exercise access only rarely, or not at all.

Questions

Should the child support guidelines provide a way, other than the undue-hardship process, to calculate the child support amount when there are high access expenses, or should judges be allowed to decide on an amount they feel is appropriate?

❒ The guidelines should provide a way to calculate child support in these situations.

Please describe in your feedback booklet a method you think would be effective and why it would work.

❒ Judges should be allowed to decide on an amount.

Why?

CHILD SUPPORT FOR CHILDREN AT OR OVER THE AGE OF MAJORITY

Since the introduction of the *Divorce Act* in 1968, the divorce laws in Canada have allowed parents and judges to determine child support for older children who are unable to provide for themselves because of illness, disability, or other reasons. In cases over the years, the courts have ruled that these other reasons include secondary and post-secondary studies.

Prior to the 1997 changes to the *Divorce Act,* judges were allowed to decide whether parents had to make child support payments for children 16 years of age or older. The amended legislation raised that threshold to the age of majority of the province or territory in which the children live (age 18 or 19; see box). Most provinces and territories have laws in place so parents and courts can determine child support for children at or over the age of majority when the parents are separating but not divorcing, or were never married.

The federal government and several provincial and territorial governments continue to support the position that judges and parents may set child support amounts for children who are at or over the age of majority on a case-by-case basis. Therefore, this document does not deal with the issue of older children's *eligibility* for child support. Other issues concerning to whom the payments should be made, and how the amount is determined, are addressed below.

Did You Know?

The laws that allow parents and judges to determine child support for children at or over the age of majority apply in most provinces and territories to intact families. Parents who are not separated or divorced may have a legal obligation to support their older children.

Federal, provincial and territorial laws allow judges to consider all of a family's circumstances when deciding on child support for older children. This goes some way to overcoming the disadvantage that research shows children of separated or divorced parents have when it comes to paying for post-secondary education.

The age of majority is **18** in six provinces: Alberta, Manitoba, Ontario, Prince Edward Island, Quebec, and Saskatchewan.

The age of majority is **19** in four provinces and the three territories: British Columbia, New Brunswick, Newfoundland, Northwest Territories, Nova Scotia, Nunavut, and Yukon.

Child Support Paid Directly to Children

The guidelines recognize that older children who are still dependent on their parents may have child support needs that are different from those of younger children. Older children may have part-time jobs or live away from home while going to school.

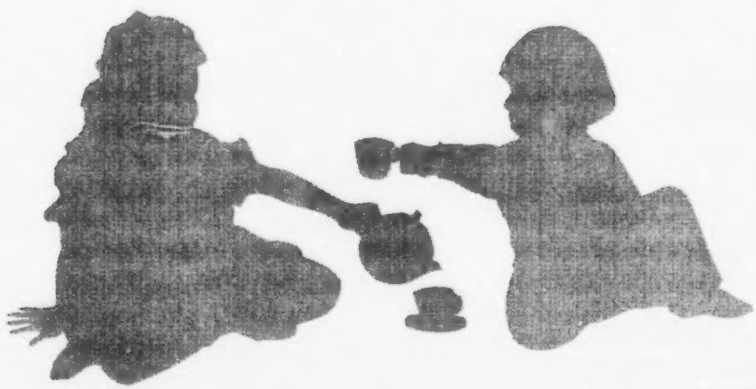
Some parents and other people have questioned whether the paying parent should have to continue to pay the child support for older children to the receiving parent (who provides a home for the children), or be able to pay it directly to the children.

Some paying parents say that they would be satisfied that the child support is being spent on the children if it were paid directly to those children. They say that this might also help ease tension between the parents.

Receiving parents point out that they continue to have costs, such as maintaining the home, to support their older children even when those children are away at school for part of the year. Receiving parents are concerned that they may not be compensated for their costs when the child support is paid directly to the children.

Here are a few additional points to consider when answering the questions below:

- Who will enforce a child support order when the support is paid directly to the children?
- Do the children have the experience or ability to manage large amounts of money?
- What impact does receiving child support have on the children's eligibility for student loans?



Questions

Should the child support guidelines allow paying parents to pay child support directly to children at or over the age of majority?

❒ Yes

❒ No

Why?

What factors should judges consider when deciding whether the paying parent should pay support directly to children?

Should the children be able to choose whether to receive support directly from the paying parent or not?

❒ Yes

❒ No

Why?

Is it important for the receiving parent to agree that the paying parent will pay support directly to the children?

❒ Yes

❒ No

Why?

Disclosure of Information

As children grow up and begin to make their way in the world, they become less dependent on their parents. During those transition years, it can be difficult to tell, however, where parental support leaves off and independence begins, and certainly each child's situation is unique.

Given this, many people suggest that receiving parents and older children should have to show that there is an ongoing need for child support to continue. This could be done by allowing the paying parent to ask once a year for information such as school records, lease agreements or other financial documents related to the children. This requirement would apply in all cases when support is to be paid for children at or over the age of majority, not just in those cases that include special expenses. Special expenses are those expenses, such as tuition for post-secondary education, that are beyond what is covered by the child support table amount. Under the guidelines, there is a section that requires parents to produce records to justify all special expenses. However, this provision does not extend to producing information about other expenses that the parents may have, related to the table amount or another amount paid for older children.

Many parents want proof that their older children are in school and, therefore, still entitled to the child support they are paying.

Other parents believe that the current rules and methods for disclosure are sufficient, and that additional requirements would be intrusive. Some parents think that involving children in their parents' dispute may have negative effects on the children.

An additional point to consider when answering the questions below is that, when support is paid directly to children, it is the children who may have to disclose financial and other information, not their parents. Children have not traditionally been a part of legal proceedings and, historically, courts have been reluctant to directly involve children of any age in their parents' proceedings.

Questions

Do you think the child support guidelines should be changed so that either the receiving parent or the children at or over the age of majority must provide the paying parent with information about the **status of the children** (for example, about their schooling, living arrangements or employment situation) once a year? This would apply in all cases when support is to be paid for children at or over the age of majority, not just in those cases that include special expenses.

❒ Yes

❒ No

Why?

Please describe in your feedback booklet any other option for addressing this issue that you think would be effective and explain why it would work.

Do you think the child support guidelines should be changed so that either the receiving parent or the children at or over the age of majority must provide the paying parent with information about the children's finances once a year? (This would apply in all cases when support is to be paid for children at or over the age of majority, not just in those that include special expenses.)

❒ Yes

❒ No

Why?

Please describe in your feedback booklet any other option for addressing this issue that you think would be effective and explain why it would work.

CHILD SUPPORT OBLIGATIONS OF A SPOUSE WHO STANDS IN PLACE OF A PARENT

Spousal and family relationships of varying permanence, and blended families, have become more common in Canadian society in recent years. A person who acts as a parent to the children of his or her spouse may have a legal obligation to support those step-children after the relationship with the spouse ends.[1]

Currently, the federal *Divorce Act* defines *a child of the marriage* (a child eligible to receive child support) as a child of two spouses or former spouses, and includes "any child of whom one is the parent and for whom the other stands in the place of a parent."

Most provinces and territories have adopted a similar definition in their own legislation or have defined *child* as "a child in relation to whom a person has demonstrated a settled intention to treat as a child of his or her family." Recently, the Supreme Court of Canada decided that it is not in step-children's best interests for a person to leave a relationship, in which he or she has assumed the role of a parent, in order to avoid paying child support.

Once a step-parent relationship has been established, the obligations of that step-parent towards the children are similar to those of the natural parents.

The process for determining the child support amount when there are step-parents is not set out clearly in federal, provincial or territorial legislation. The Federal Child Support Guidelines, for example, currently allow judges to set a child support amount they consider appropriate. When making this decision, judges must take into account the amount set out in the child support tables and the legal duty of any parent other than the step-parent to support the children.

In provincial legislation such as Manitoba's, a step-parent's obligation to pay child support is second behind the natural parents' obligation. In addition, the step-parent generally has to pay support only when the natural parents fail to provide reasonably for the children's support, maintenance or education. When the children's natural parents pay the full amount of child support, the step-parent may not have to pay anything. The law does not say how to determine how much the step-parent should pay when the children's natural parents are not paying the full amount.

Judges have used various approaches to calculate the amount of child support a step-parent would pay under both the Federal Child Support Guidelines and provincial and territorial legislation. For example, judges have done the following:

- split the *total* amount of the expenses related to the children among all the paying parents, according to the ability of each parent to pay;
- added the incomes of all the paying parents to get the total income, found the child support table amount for that figure, and then split that amount among the paying parents, based on the percentage of the total income each earns;

[1] Not all step-parents would have a child support obligation. In this consultation paper, the terms step-children and step-parent are used for ease of reference only. Step-children are children for whom a spouse stands in the place of a parent. A step-parent is a spouse who stands in the place of a parent to children.

- figured out the percentage figure that reflects the role each parent plays in the children's lives, each parent then paying that percentage of the table amount for his or her income level; and
- had each parent pay the table amount for his or her income level, an option that may result in the amount of child support being larger than it might otherwise be.

Questions

Should the child support guidelines be changed to provide more direction to parents and judges about whether a step-parent should pay child support, and how much he or she should pay?

❒ Yes

❒ No

Why?

There are different ways judges could figure out how much support a step-parent should pay. Two ways are:

- The step-parent could pay the table amount minus the amount the natural parent is paying.
- Each paying parent, including the step-parent, could pay the table amount for his or her income level.

Do you think either of these approaches would be effective?

❒ Yes

❒ No

Why?

Please describe in your feedback booklet any other approach you think would be effective and explain why it would work.

APPENDIX A:
AN INVENTORY OF GOVERNMENT-BASED SERVICES THAT SUPPORT THE MAKING AND ENFORCEMENT OF CUSTODY AND ACCESS DECISIONS

This document provides an inventory of provincial and territorial government programs that support making and enforcing child custody and access decisions. The focus is on the services that deal with divorce or separation when children are involved. These may include parent education, mediation, family-law information, legal aid, case management, child custody and access assessments, and supervised-access facilities.

The study does not intend to be scientific or statistical, nor is it a detailed accounting. Rather, members of the Federal-Provincial-Territorial Family Law Committee wanted to know about the range of programs available across Canada. This knowledge will be useful in discussing the ideal mix of services to support post-separation parenting arrangements. The document also aims to encourage communication among jurisdictions by briefly providing the locations, names and phone numbers of the programs.

The following six headings reflect the nature of the material contained in this inventory:

- Mediation, information and parent education
- Court-based services
- Where the child is the client
- Supervised access
- Relevant legislation
- Enforcement

Only programs or services that are in force, or that had a 1999 implementation target date, are included. Programs or services that are planned but have no implementation target date are briefly mentioned, and reference material provides more complete information.

You can find this Inventory on the Department of Justice Canada website at:

http://canada.justice.gc.ca/en/ps/cca/invent/main.htm

Copies can also be requested by calling 1-888-373-2222.

APPENDIX B:

PROVINCIAL AND TERRITORIAL PAPERS

Use of Dispute Resolution in Access Enforcement Effectiveness, Description of Models, and Policy Issues (prepared for the British Columbia Ministry of the Attorney General)

Dispute resolution is a useful and successful tool for resolving most conflicts experienced by couples who are separating or divorcing. Many social science studies conclude that between 80 and 90 percent of cases involving disputes between separating couples can be dealt with effectively by some type of non-judicial intervention. This intervention includes mediation, counselling or parental education. Anecdotal evidence indicates that mediation is less likely to resolve difficult access cases. Three recent reports have looked specifically at this issue. One study deals with the Australian experience and two others evaluate programs relating to access enforcement in various U.S. jurisdictions.

This discussion paper is divided into three parts. The first part describes the three above-mentioned social science studies. The second part describes some approaches other jurisdictions are using to ensure compliance with access orders. The third part discusses various policy issues that require further study and thought.

This paper is posted on the website of the British Columbia Ministry of the Attorney General at:
http://www.ag.gov.bc.ca/public/dispute_res_access_enf.htm

Custody and Access Terminology: Options for Legislative Change in BC (prepared for the British Columbia Ministry of the Attorney General)

In its *Strategy for Reform*, the federal government responds to the report of the Special Joint Committee on Child Custody and Access. It indicates that the federal government will be working closely with the provinces and territories to determine what changes, if any, should be made to the terms "custody" and "access" in the *Divorce Act* and corresponding provincial legislation. Given the concurrent jurisdiction of the federal and provincial governments for child custody and access, any amendments to the federal *Divorce Act* would have an impact on provincial laws dealing with child custody and access, such as the British Columbia *Family Relations Act*.

This report analyzes the benefits and drawbacks of several options for changing the law of child custody and access in British Columbia, with a particular emphasis on terminology. The research focuses on the provincial *Family Relations Act*, but also discusses the federal *Divorce Act*. The emphasis is on what terms should be used to describe parenting after separation, and on how parenting rights and responsibilities should be divided between parents after

separation or divorce. The Ministry of the Attorney General intends to use this paper as a starting point for considering whether the provisions of the *Family Relations Act* concerning child custody and access should be amended and, if so, how they should be amended.

The first part of the report carefully studies the provisions of the *Family Relations Act* and the *Divorce Act* and analyzes the current law of child custody and access in British Columbia. Relevant case law and secondary texts are also reviewed. The legislative provisions containing these terms are then reviewed to assess the impact of changing the terms "custody" and "access" in the *Family Relations Act*.

The second part of the report analyzes the experiences of four foreign jurisdictions that have reformed their child custody and access laws in recent years: Washington State, Oregon State, the United Kingdom and Australia. These jurisdictions are chosen because each has significantly reformed its child custody and access legislation over the past decade, including changes to terminology. For each of the four jurisdictions, the legislative provisions and the available evaluation research are studied to determine the nature of the legislative reforms and whether the reform objectives have been met.

The third part of the report identifies options for legislative reform and discusses the benefits and drawbacks of each option. These options are identified from the experiences in other jurisdictions, policy and position papers concerning child custody and access, and discussions with staff of the Ministry of the Attorney General.

This paper is posted on the website of the British Columbia Ministry of the Attorney General at:

http://www.ag.gov.bc.ca/public/custody_access_term.htm

Assessing, Serving and Maintaining Parenting Arrangements for High Conflict Families (by Policy Planning and Evaluation, Saskatchewan Justice)

This paper focuses on describing a spectrum of services available to families to help reduce the levels of conflict. The "one size fits all" approach is inappropriate for all children or all families. Families are unique and experience different levels of conflict during separation and divorce. The paper recognizes that levels of conflict may change during different periods of their relationships. Therefore, families need quick and accurate assessments and a variety of programs and services to help reduce conflict or, where it cannot be reduced, to minimize the parental contact to avoid the conflict.

Whether assessing the situation, providing services or supporting ongoing parenting, the responsibility is not limited to government. Individuals, the community and organizations have roles in reducing the conflict and raising healthy, resilient children.

Copies of this paper can be obtained from:

Policy, Planning and Evaluation
Saskatchewan Department of Justice
4th Floor, 1874 Scarth Street
Regina, Saskatchewan
(306) 787-3481

APPENDIX C:

DEPARTMENT OF JUSTICE CANADA PAPERS

Completed Projects

The following projects have been completed and the reports have been or will soon be published. Some of these reports may be available on-line, and all of them can be accessed by calling 1-888-373-2222.

Selected Statistics on Canadian Families and Family Law (by Department of Justice, Child Support Team) (CSR-2000-1E/1F)

This document brings together and presents family law and family-law related statistics relevant to child support and custody and access. The report was prepared by the Research Unit of the Child Support Team and draws upon a range of data sources.

You can find this document on the Department of Justice Canada website at:

http://canada.justice.gc.ca/en/ps/sup/pub/rap/SelStats.doc

Custody, Access and Child Support: Findings from the National Longitudinal Survey on Children and Youth (by Nicole Marcil-Gratton & Céline Le Bourdais) (CSR-1999-3E/3F)

This research project provides empirical information on what happens to children after their parents separate in terms of custody, access of the non-custodial parent, and child support payments. This information aims to help develop policy on child custody and access based on solid statistical data on what is now happening in Canadian families. The authors analyze the data from the Family History and Custody section of National Longitudinal Survey on Children and Youth. Over 22,000 children, up to 11 years of age, were first surveyed during the winter of 1994-1995. The sample is organized in a way that gives a good cross-section of data at each cycle, as well a sample to be followed over time at the rate of one survey every two years. The content includes a wide range of issues touching on the children's levels of development and their socio-demographic background.

You can find this document on the Department of Justice Canada website at:

http://canada.justice.gc.ca/en/ps/sup/pub/anlsc.pdf

Focus Groups on Family Law Issues Related to Custody and Access (by S.A.G.E. Research Group) (2000-FCY-5E/5F)

This project consisted of a limited number of focus groups undertaken to assist in the development of policy options relating to child custody and access. A total of three ten-hour focus groups were conducted between March 8 and March 16, 2000, with parents of children under 18 years in various locations across the country. Parents were brought together to review materials, discuss options, and let their views be known concerning (i) which "best interests of the child" criteria should be used in the reform of the family law system, and (ii) child custody and access terminology and possible alternatives to these terms.

The final report discusses the results of the focus group testing by summarizing the views expressed and by outlining the underlying values and rationales that lead the public to those choices and preferences. By its very nature, qualitative research is exploratory and directional only. It does not seek to quantify the results of the research nor do the research results project statistically to the attitudes and opinions of the population as a whole. Focus testing does, however, produce a richness and depth of response not readily available through other methods of research.

Divorce Reform and the Joint Exercise of Parental Authority: The Quebec Civil Law Perspective (by Dominique Goubau, Professor, Faculty of Law, Laval University) (2000-FCY-3E/3F)

This paper reviews the Quebec civil-law concept of the "joint exercise of parental authority." It describes the concept and provides a critical analysis of how it is applied and understood in Quebec. The purpose of the paper is to examine whether, in the context of divorce reform, the Quebec civil law offers an alternative in terms of parental roles.

The Voice of the Child in Divorce, Custody and Access Proceedings (by Ronda Bessner, Legal and Policy Consultant) (2001-FCY-1E/1F)

This paper examines ways that the voices of children can be heard during divorce, custody and access disputes. A central thesis is that children be given real and not merely symbolic roles in legal hearings that affect their lives. The paper begins with a discussion of the dichotomy between protecting children and promoting their interests. Article 12 of the *United Nations Convention on the Rights of the Child* is then examined. The paper also explores whether children should have the right to independent legal representation and analyzes three different models of legal representation. As well, the paper discusses communicating the views, interests, and wishes of the child by third parties to legal decision-makers. Suggestions are made to policy-makers and legislators about support mechanisms and advocacy services that should be available to children.

Keeping in Contact with the Children: The Father/Child Relationship After Separation from the Non-custodial Father's Perspective (by Céline Le Bourdais, Heather Juby and Nicole Marcil-Gratton, Centre interuniversitaire d'études démographiques, Institut national de la recherche scientifique, Université de Montréal)

The purpose of this project is to use the data from the 1995 General Social Survey (GSS) to further our understanding of the factors that affect the relationship between non-custodial fathers and their children after separation.

The GSS provides information directly from both male and female respondents on the frequency of contact they and the other parent maintained with their children. This survey thus has a unique advantage over most studies of father/child contact, which rely almost exclusively on information provided by mothers. Although male and female respondents to the GSS were not

reporting on the same children (i.e., they were not the two parents of the children in the sample), the researchers were able to build a picture of the way in which the separated fathers view the contact they do or do not have with their children. The project exploits the richness of the GSS data on the relationship between separated parents and their children, with particular emphasis on the point of view of men. It will first describe the characteristics and the values and attitudes of separated fathers, and then identify the factors and conditions that influence the likelihood that fathers will maintain contact with their children.

Allegations of Child Abuse in the Context of Parental Separation: A Discussion Paper (by Canadian Research Institute for Law and the Family) (2001-FCY-4E/4F)

The purpose of this project was to conduct research on false allegations of abuse in divorce proceedings; identify the relevant issues and trends that are documented by Canadian case law; and examine and assess the current response by the civil and criminal systems to allegations of child abuse.

The report sets out to address the following four questions:

- What are the current responses by child protection agencies and the civil and criminal legal systems to allegations of child abuse?
- What is the nature and extent of allegations of child abuse in the context of child custody and access disputes?
- What are the key issues associated with false allegations of abuse?
- What strategies need to be developed to appropriately deal with this problem?

Forthcoming Reports

The following projects have not yet been completed. It is expected that these projects will all result in published research documents in the coming year.

The Early Identification and Streaming of Cases of High-Conflict Separation and Divorce: A Review (by Ron Stewart, Family Therapy Associates)

The purpose of this research is to develop a knowledge base that will assist in identifying and managing high-conflict separation and divorce in Canada. The research will employ two basic methodologies: a review of the international literature, and interviews with select experts in the field of high-conflict separation and divorce.

In particular, the research will look at:

- existing definitions of high-conflict separation and divorce and levels of conflict in separation and divorce;
- currently available and used methods and mechanisms for identifying high-conflict separation and divorce; and
- currently available and used means and mechanisms for streaming high-conflict cases through the process of separation and divorce and child custody and access.

The final report will analyze the available information on the nature and scope of high-conflict separation and divorce in Canada, and treatments and interventions currently being used in cases of high-conflict separation and divorce.

Overview and Assessment of Approaches to Access Enforcement
(by Martha Bailey, Faculty of Law, Queen's University)

This project will provide a comparative review of legal approaches to the problem of enforcement of access orders, and an analytical investigation of Canadian case law and legislation.

The comparative analytical review of legal literature will look at western common law jurisdictions including, but not necessarily limited to, Canada, the United States and Australia. The review will address such matters as learned opinion on the nature, extent and scope of access denial and non-exercise of access, best options for dealing with access issues, and possible models for application in Canada.

The review of legislation will include federal, provincial and territorial law on access enforcement. The review of Canadian case law on enforcing access orders will identify reported Canadian cases. As well, the review will analyze unwarranted access denial in Canada, the use of the law to litigate access enforcement and punish access denial, the problems for the courts and legal system, and how Canadian judges deal with cases of unwarranted access denial.

The Problem of Access: Legal Approaches and Program Supports
(by Pauline O'Connor, Policy Research Consultant)

This project will analyze and review sociological research on enforcing access for non-custodial parents, custodial parents unreasonably denying access, and non-custodial parents not exercising access.

It will include an analytical review of western, common-law literature to uncover and assess existing evidence concerning the extent of unwarranted access denial on the part of custodial parents, and the non-exercise of access on the part of non-custodial parents. These jurisdictions will include, but not necessarily be limited to, Canada, the United States and Australia.

It will also involve an analytical review of existing programs and services. The objective is to identify and assess distinct program and service models in western common law jurisdictions for addressing access enforcement, and to review and assess any evaluation research on these programs and services. In particular, the program in place in the State of Michigan will be examined.

The third aspect of the project is to review research data needs respecting this issue. Existing research tools will be examined to assess whether they are suitable for collecting quantitative and qualitative data on unwarranted access denial and non-exercise of access, as well as the legal caseload of access enforcement. The review will compare existing Canadian data with data from other jurisdictions and the strengths, weaknesses and limitations of the data. It will include suggestions about what could be done in Canada in the short-term to improve data concerning unwarranted access denial and non-exercise of access.

Survey on Arrangements Dealing with Custody and Access (by Canadian Facts)

This project involves interviewing a small sample of parents from across the country on the subject of child custody and access to address the lack of baseline data on matters relating to child custody and access. The objective is to collect data that will address the following:

- Whether separated or divorced parents have child custody and access arrangements; and, if so, whether the arrangement is court ordered, written or oral.
- Details on the arrangement, such as who has custody, whether the non-custodial parent has access, and who makes the major decisions concerning the child.
- Whether the original arrangement has changed.
- What service or help, if any, parents used to reach their arrangement.
- Levels of satisfaction with the arrangement and with services used.

An Analysis of Options for Changes in the Legal Regulation of Child Custody and Access (by Brenda Cossman, Professor, Faculty of Law, University of Toronto)

The objective of this paper is to sketch out and evaluate possible reform models to the child custody and access provisions of the federal *Divorce Act*. Three different options are identified. The first option works within the current language of child custody and access; the second option is based on a neutral model of parenting responsibility and parenting orders; and the third option adopts a model of shared parenting.

The first section of the paper reviews general goals and objectives for reform in this area and the general challenges associated with any reform of the legal regulation of child custody and access. It examines the potential role of terminological change in reducing conflict and promoting parental co-operation, as well as the role of law more generally in encouraging and promoting attitudinal and behavioural change among divorcing parents.

The second section of the paper examines the ways that other jurisdictions have tried to meet these challenges in the reform of child custody and access laws. Particular attention is given to the reforms adopted in the United Kingdom, Australia, the State of Washington and the State of Maine, although examples are also drawn from several other jurisdictions.

The third section analyzes the three options for reform. The discussion of each option includes the various policy choices and approaches that need to be considered. The relative advantages and disadvantages of each option are explored, taking into account the general reform objectives and the extent to which the options reflect the guiding principles for reform.

Further Projects

Further research projects are in development including: a second phase project on options for addressing high-conflict divorce; a critical review of parenting plans, including a compendium of model plans in use in Canada and elsewhere; a project exploring programs and services that address children's needs to have a say in their child custody and access arrangements; an overview analysis of empirical data on the risks to children of divorce; a literature review summarizing the comparative benefits and problems associated with different types of child custody and access arrangements; and an exploratory examination of the utility of non-traditional, or focused, interventions as opposed to more traditional child custody and access assessments.